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Profile of a Filibustered Nominee: Miguel Estrada

Editorial

“Protecting Judicial Activism,” by Bradley Gitz, Arkansas Democrat Gazette, 5/5/05

Noteworthy

Days Pending for Bush Appeals Court Nominees

Nominee	Nomination Date	Current	Days Pending
Janice Brown, D.C. Circuit	7/25/03	5/5/05	650
Thomas Griffith, D.C. Circuit	5/10/04	5/5/05	360
Brett Kavanaugh, D.C. Circuit	7/25/03	5/5/05	650
Terrence Boyle, Fourth Circuit	5/9/01	5/5/05	1456
William Haynes, Fourth Circuit	9/29/03	5/5/05	584
Priscilla Owen, Fifth Circuit	5/9/01	5/5/05	1456
Richard Griffin, Sixth Circuit	6/26/02	5/5/05	1044
David McKeague, Sixth Circuit	11/8/01	5/5/05	1274
Susan Neilson, Sixth Circuit	11/8/01	5/5/05	1274
Henry Saad, Sixth Circuit	11/8/01	5/5/05	1274
William Myers, Ninth Circuit	5/15/03	5/5/05	721
William Pryor, Eleventh Circuit	4/9/03	5/5/05	757
AVERAGE			958 days

... and counting.

Profile of a Filibustered Nominee: Miguel Estrada

- Miguel Estrada immigrated to the United States from Honduras as a teenager. He spoke little English, but his strong heart and brilliant mind helped him graduate

magna cum laude and Phi Beta Kappa from Columbia College in New York. He earned his J.D. from **Harvard Law School** – where he served as editor of the Harvard Law Review.

- He clerked in the **Second Circuit Court of Appeals and for Supreme Court Justice Anthony Kennedy** before working as a **Deputy Chief U.S. Attorney** and as an **Assistant to the Solicitor General of the United States**.
- The **American Bar Association** gave him their highest rating.
- But after two years, **more than 100 hours of debate, and a record 7 attempts to move to a simple up-or-down vote**, Miguel Estrada *withdrew* his name from consideration.

Editorial

“Protecting judicial activism,” by Bradley R. Gitz, Arkansas Democrat Gazette, 5/5/05

Lost within media coverage of the game of chicken being played by Democrats and Republicans over the Democrats’ use of the filibuster are several important points.

The confrontation doesn’t constitute a constitutional crisis, as some alarmist commentators have suggested, because the filibuster isn’t and never has been a constitutional provision.

To the contrary, the idea of cloture is merely a Senate rule dating back to 1917, when a two-thirds requirement was introduced to end otherwise endless Senate debates. The rule was revised in 1975 to require only 60 votes under the sponsorship of Robert Byrd, the man currently comparing the Republicans to Nazis for suggesting further revisions. The Republican proposal to reduce the requirement for cloture to a simple majority has been referred to as the "nuclear option"; in reality, it’s not even a 105 mm howitzer.

Unlike Republican proposals to revise the cloture rule, the Democratic resort to the filibuster to block Bush administration judicial nominees is historically unprecedented.

The filibuster has been used for a range of often nefarious purposes over time, perhaps most spectacularly during the 1950s and ’60s as a means for segregationist Southern Democrats to block civil rights legislation. But it has never been used to prevent an up-or-down vote on appellate court nominees who have been approved by the Senate Judiciary Committee.

What the Democrats are doing in the Senate is, therefore, a departure from the same Senate "tradition" they claim Republicans are recklessly jeopardizing. Nor is there any parallel between Republican efforts to block Bill Clinton’s judicial nominees and Democratic efforts to block George W. Bush’s nominees because the Republicans never resorted to filibusters to deny votes on nominees by the full Senate.

The Democrats’ charge that Republican threats to alter rules on cloture represent a disruption of Senate harmony conveniently overlooks their own leadership’s provocative prior decision to use parliamentary gimmicks to undermine the Senate’s constitutional duty to "advise and consent" to judicial nominations and is akin to blaming America’s declaration of war on Japan after Pearl Harbor for disturbing the tranquility of the Pacific.

Democratic obstructionism has nothing to do with the merits of the Bush appellate court nominees in question, but everything to do with broader questions of judicial philosophy.

Democrats claim, in yet another inversion of logic, that they are protecting the Constitution by blocking "extremist" judges, but what they are really seeking to protect is the liberal ability to creatively reinterpret that same Constitution to ratify liberal political goals. For Democrats, the word "extremist" applies only to judges who feel bound by the Constitution and the intentions of those who crafted it, never to those who treat it as a Rorschach blot when issuing their rulings (so long as those rulings lean leftward on the vital social and cultural issues of the day).

Strict constructionists of the kind being nominated by Bush are unwelcome to liberals not only because they interpret the Constitution in a manner unlikely to approve liberal goals, but also because such an approach returns many issues from the courts to democratically elected legislatures.

And therein lies the rub, as liberal reliance upon the federal courts has grown over time only because liberals have been unable to get what they want on such issues through such democratically elected bodies.

Judicial activism tends to be the desperate tactic of those who lose up-or-down votes of the people's representatives—just as the filibuster is now being used by Democrats to prevent Senate votes on Bush's nominees.

Having held the presidency for only eight of the past 24 years and unlikely to regain either chamber of Congress for many years to come, Democrats want to prevent the federal judiciary from being foreclosed as a route to liberal achievements. What matters for Senate Democrats is not just blocking a handful of Bush lower-court nominees; rather, the goal is to make an example of those nominees to dissuade Republicans from seriously attempting to retake the last remaining citadel of unvarnished liberalism.

Those of us who believe in limited government tend to find the filibuster appealing because it provides an additional layer of security for minority rights against ephemeral, often dangerous majority sentiments.

But who wouldn't laugh at those whose means of protecting the Constitution are to block judges who would take it more seriously?

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